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CASE NO.

in the Supreme Court of the United States

AZTEC STEEL COMPANY, A.F.S.C.O., INC., ATLANTIC STEEL FABRICATORS, INC., and FAIRMONT STEEL CORPORATION,
Petitioners,

vs.

FLORIDA STEEL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Petitioners, AZTEC STEEL COMPANY, A.F.S.C.O., INC., ATLANTIC STEEL FABRICATORS, INC., and FAIRMONT STEEL CORPORATION, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above styled case on November 4, 1982.

QUESTION PRESENTED

The question presented is whether a Rule 37(b) sanction of dismissal may be used where there has been no actual failure to comply with any court order compelling discovery. More specifically, the issue is whether willful defiance warranting dismissal can be inferred from the provision of interrogatory answers which are perceived in part as substantively insufficient.

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OPINIONS BELOW

The opinion of the Court of Appeals in *Aztec Steel Company v. Florida Steel Corporation*, 691 F.2d 480 (11th Cir. 1982), appears in Appendix A hereto. The decisions and orders of the district court have not been reported officially, but appear in Appendices B and C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was rendered on November 4, 1982. This Petition for Writ of Certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Rule 37(a) and (b) of the Federal Rules of Civil Procedure is printed in Appendix D to the Petition.

STATEMENT

On December 11, 1975, ATLANTIC STEEL FABRICATORS, INC., A.F.S.C.O., INC., AZTEC STEEL CO., BAY STEEL COMPANY and FAIRMONT STEEL CORPORATION, all independent fabricators of reinforcing steel bars (rebar) filed suit against GEORGETOWN STEEL CO., FLORIDA STEEL COMPANY, LACLEDE STEEL COMPANY, OWEN STEEL COMPANY OF FLORIDA and BETHLEHEM STEEL CORPORATION, in the United States District Court for the Southern District of Florida.[1] Jurisdiction was invoked under 28 U.S.C. §1337.

On April 15, 1976, the action was transferred to the Middle District of Florida. Extensive discovery was commenced, initially by PETITIONERS and later by RESPONDENTS. Settlements were reached with GEORGETOWN and OWEN and these parties were dismissed by stipulation on April 11, 1977, and April 27, 1979, respectively.

The voluminous discovery leading to the judgment on appeal was filed by BETHELEM on April 29, 1977, and by LACLEDE on May 25, 1977. It consisted of in excess of 1200 interrogatory parts and subparts to each of the five PETITIONERS. PETITIONERS, after several stipulated extensions, filed answers to BETHELEHEM's and LACLEDE's interrogatories between October 26 and November 16, 1977.

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[1]The Plaintiffs/Appellants/Petitioners will be referred to herein as "PETITIONERS." The Defendants/Appellees will be referred to by name, *e.g.*, "FLORIDA", "BETHLEHEM", "LACLEDE", etc., or jointly as "RESPONDENTS".

On April 25, 1978, LACLEDE filed a Motion to Compel Answers to their interrogatories. On July 11, 1978, BETHLEHEM did likewise. On September 19, 1978, the court granted BETHLEHEM's Motion to Compel. On October 6, 1978, PETITIONERS filed their first Supplemental Answers to BETHLEHEM's interrogatories, and on October 24, 1978, PETITIONERS filed their First Supplemental Answers to LACLEDE's First Interrogatories.

On March 6, 1979, LACLEDE filed a Motion to Compel. On June 1 through June 8, 1979, BETHLEHEM filed Motions to Compel against PETITIONERS.

On November 25, 1979, the magistrate granted LACLEDE's and BETHLEHEM's motions and compelled PETITIONERS to supplement answers to the First Interrogatories. The PETITIONERS filed their Second Supplemental Answers to BETHLEHEM's and LACLEDE's First Interrogatories on January 15, 1980.

On March 10, 1980, BETHLEHEM filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 37(b)(2). On March 26, 1980, LACLEDE filed a similar motion. On March 28, 1980, FLORIDA joined the Motion to Dismiss of BETHLEHEM and LACLEDE. Prior to this "joinder" FLORIDA had been uninvolved in the discovery dispute.

On August 14, 1980, the magistrate recommended that the action be dismissed. On August 25, 1981, the district judge dismissed the action with prejudice. PETITIONERS were not afforded a hearing on the motion to dismiss before the district judge. In fact, the entire proceeding leading up to the dismissal with

prejudice (except for the Final Order) was held before a magistrate.

PETITIONERS appealed[2] from the Final Order dismissing their Complaint with prejudice to the United States Court of Appeals for the Eleventh Circuit. In its opinion rendered on November 4, 1982, the Court of Appeals affirmed, without allowing oral argument, the district court's order dismissing the action against FLORIDA even though FLORIDA had no discovery outstanding which had been the subject of any motion to compel.

REASONS FOR GRANTING THE WRIT

A. Conflict With Applicable Decisions of This Court

PETITIONERS submit that the Eleventh Circuit decided the case below in a manner which conflicts with applicable decisions of this Court. The court below based its decision upon *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). In doing so, the court found that the interrogatory answers of PETITIONERS which the magistrate and the trial court perceived to be substantively insufficient equaled a willful failure to comply with court orders. PETITIONERS suggest that the manner in which the lower court applied the *National Hockey League* case and its progeny is contrary to the purposes and intent evidenced in

[2]BAY STEEL COMPANY did not appeal. Additionally, on May 28, 1982, after an amicable settlement, the claims against BETHLEHEM and LACLEDE were dismissed by stipulation.

these decisions and in Fed.R.Civ.P. 37. *National Hockey League* neither envisions nor permits the imposition of the sanction of dismissal because the propounding party is dissatisfied with the substance of the responses. This harshest of sanctions is warranted only where the record demonstrates willful defiance of a court's orders.

The course of discovery in *National Hockey League* reveals certain essential facts which plainly distinguish it from the instant case:

National Hockey League	Instant Action
In response to interrogatories initially, there was no timely response and no timely filing of objections. In addition, there was no request for extensions of time.	PETITIONERS always filed objections and responses or received extensions in a timely manner.
In response to a court order requiring all objections to be filed by a certain date, most of the objections filed were general objections with a few specific references. In response to the court order requiring answers, the plaintiffs served a single unsigned, unsworn paragraph.	PETITIONERS made specific objections and filed specific sworn responses to the interrogatories.
No intervening supplementation of answers was provided, and the requested information was not available at the pre-trial conference date, requiring a continuation of the trial date.	PETITIONERS supplemented their responses several times and the trial date was never cancelled due to lack of response.

National Hockey League	Instant Action
In response to the second order requiring answers by March 11, 1974, no formal answers or motions for extensions of time were filed.	PETITIONERS never failed to comply with any order or to provide information which they possessed.
In a response to a motion for sanctions, which was denied, the court reset the trial again due to the plaintiffs' second breach of the pre-trial schedule set by the court.	PETITIONERS never violated a pre-trial schedule.
There was insufficient evidence elsewhere in the record to support any cause of action.	There are vast amounts of evidence in the record supporting the claims of PETITIONERS.
The defendants were prejudiced by the delays in discovery and the refusal to obey court orders compelling discovery because of the imminent trial date and the lack of additional discovery time to supplement information provided by interrogatory answers.	FLORIDA cannot demonstrate any prejudice, as it had no discovery outstanding which was subject to any motion to compel.
The final pre-trial order requiring additional answers to substantiate the plaintiffs' cause of action resulted in the filing of no response whatsoever by the plaintiffs.	PETITIONERS never failed to comply with any order to provide answers.

Thus, the plaintiffs in *National Hockey League* inflicted a great degree of prejudice upon the opposing

parties, failed utterly to obey numerous orders of the court, and concurrently failed to establish in the record any cause of action against the defendants. Such grievous behavior is totally lacking in the instant cause.

B. Conflict With Decisions of Other Circuit Courts of Appeals

The decision of the lower court conflicts with *Jones v. Louisiana State Bar Ass'n.*, 602 F.2d 94 (5th Cir. 1979); *Emerick v. Fenick Ind. Inc.*, 539 F.2d 1379 (5th Cir. 1976); and *Marshall v. Segona*, 621 F.2d 763 (5th Cir. 1980). The circuit court relied upon *Jones* and *Emerick* in support of its decision. Rather than offer support for the sanction imposed by the lower court, these cases demonstrate the extreme behavior (absent in the instant cause) warranting dismissal as a sanction. *Marshall*, on the other hand was disregarded by the lower court even though the instant cause presents a fact pattern of the nature envisioned in that case.

In *Jones, supra*, the party sanctioned failed to appear or terminated early six depositions. In one of the depositions the plaintiff had revealed that she had aped telephone conservations and then made handwritten notes after speaking with a representative of the defendant. She agreed to produce the tapes and notes and then refused to do so. She was subsequently ordered by the court to produce the recording, the recorder and the notes and at that hearing she made no objection. On the day she was required to produce the materials, she filed a motion to quash the order. That same day at hearing, she was ordered again to produce the requested

materials within one hour, and was told by the judge that she could use that hour to confer with her attorney. Within the judge's hearing she told her attorney she would refuse to produce the materials and would use her hour to take her story to the press. She subsequently refused to produce the recording and the notes, and was consequently held in criminal contempt by the judge, as well as sanctioned by dismissal under Rule 37. The court found that her conduct was "deliberately obstructive." 602 F.2d at 94. Thus, the behavior that warranted sanction in that case was such behavior as also amounted to criminal contempt.

Emerick, supra, involved a failure to comply followed by an order compelling compliance followed by an additional failure to comply. The lower court again ordered compliance observing that the failure had been "unbelievably flagrant." 539 F.2d at 1380. Again the responding party failed properly to comply. The Fifth Circuit held:

> Nevertheless, when a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion.

Id. at 1381.

In sum, the two decisions relied upon by the lower court require a showing of flagrant bad faith far beyond the facts in this cause. These cases do not support the decision of the lower court.

In *Marshall, supra*, the defendant served nineteen interrogatories some three months after the suit was filed. The plaintiff timely answered but failed to respond to certain of the interrogatories, claiming that the omitted answers were being compiled but compliance was difficult. The defendant moved for the imposition of sanctions and the plaintiff provided cursory answers. The court denied the motion but ordered under Rule 37(a) that the plaintiff "fully and completely" answer the interrogatories within thirty days, stating that a failure to comply would upon request result in dismissal. On January 19, 1979, some four days late, plaintiff filed a one hundred page exhibit. In March 1979, the defendant moved to dismiss under Rule 37(b). The district court granted the motion with prejudice finding that the answers were over a year late and that plaintiff had acted in bad faith.

In reversing the dismissal the Fifth Circuit first acknowledged its cases where the supreme sanction had been utilized.[3] These cases all involved "extreme circumstances." *Id.* at 767. Alternatively, the court recognized that dismissal is too harsh a sanction in many cases stating that dismissal is to be sparingly used and only in situations where its deterrent value cannot be achieved by use of less drastic sanctions. *See, Griffin v. Aluminum Co. of America*, 564 F.2d 1171 (5th Cir. 1977). 621 F.2d at 768. The court further stated that whether the other party's preparation for trial is substantially prejudiced is a consideration. *See, Silas v. Sears, Roebuck & Co.*, 586 F.2d 382 (5th Cir. 1978). 621 F.2d at 768.

[3]Citing, *Emerick* and *Jones* among others.

By applying the facts before it to those principles the court concluded that dismissal was inappropriate. The court conceded that the order of the district court was not met; however, pointed out that a good faith partial compliance with the discovery request was made. The court found that the inadequate state of the defendant's records made it difficult for plaintiff to answer. The court also found it significant that the defendant was not prejudiced by the lack of compliance as no discovery cutoff had been scheduled. The court thus found that noncompliance was due to an inability to comply, and was not done in bad faith nor did it prejudice the defendant, hence the reversal.

In sum, the lower court was faced with facts warranting the application of *Marshall.* It responded by erroneously relying upon *Jones* and *Emerick.* Its decision therefore conflicts with all three cases.

C. Important Federal Question

The decision of the Eleventh Circuit in this case incorrectly resolved a question of federal law which has not been decided by this Honorable Court. The question presented is whether dismissal as a Rule 37 sanction is proper where interrogatory answers are found to be a constructive failure to obey a court order as opposed to a willful defiance of a court order. PETITIONERS urge that the court below erred in upholding the sanction of dismissal on facts which, at best, suggest a constructive failure to comply. PETITIONERS respectfully suggest that this Court should decide this question due to the paramount importance to all litigants.

The magistrate and district judge apparently perceived a willful disobedience on the part of PETITIONERS in reviewing the discovery responses. The order of the magistrate which was allegedly disregarded by PETITIONERS directed them to supplement interrogatory answers by providing complete answers. PETITIONERS responded with supplementation both times they were ordered to do so. The supplementation was provided in direct compliance with the magistrate's order.

It would appear the crux of the lower court's decision is this:

1. The magistrate was of the opinion that more information existed than had been disclosed in the interrogatory responses, rendering the responses substantively insufficient.

2. Because of his opinion regarding substantive insufficiency, the magistrate concluded that the answers provided were therefore evasive and incomplete.

3. Regarding these answers as incomplete, the magistrate therefore recommended that they be dealt with as though they were a refusal to comply with the court order.

4. Treating the answers, then, as a refusal, bad faith warranting dismissal was inferred.

There are at least two problems with this approach.

First, the specific authorization by which the court may treat what is perceived to be incomplete answers

as a failure to answer is contained within Rule 37(a) which authorizes the court to compel answers to discovery. The standard contained in Rule 37(b) authorizing sanctions for failure to comply with an order states:

> if a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just . . .

The provision in Rule 37(a) regarding an evasive or incomplete answer is by its own terms limited to the entry of an order to compel under subdivision (a). Rule 37(a)(3) states:

> *For purposes of this subdivision* an evasive or incomplete answer is to be treated as a failure to answer. (emphasis supplied)

Similar language authorizing sanctions to be based solely on interrogatory answers perceived as evasive or incomplete is simply not found in the subsection authorizing a sanction of dismissal for failure to comply with the court order. Subsection (b) of Rule 37 which allows the sanctions enumerated in paragraphs (A), (B) and (C) of subdivision (b)(2), does so for very specific behavior, including, "If a party . . . fails to obey an order to provide or permit discovery . . ." and Rule 37(b) was the precise basis of FLORIDA's motion to dismiss. The misinterpretation by the magistrate of Rule 37 is more significant when considered in light of the absence of any discovery on the part of FLORIDA which had been the subject of an order of court compelling discovery.

The importance to litigants of the question presented is manifest in the fact that the trial court's order of dismissal is actually a ruling on the merits of PETITIONERS' claims under the guise of a procedural sanction. Assuming any sanction was proper there obviously were other sanctions which could have been used by the lower court given the lack of any refusal or bad faith. It cannot reasonably be suggested that the answers regarding every claim of PETITIONERS were insufficient. Thus the trial court could have excluded evidence of certain claims (or even perhaps dismissed individual claims).

More properly, however, the lower court should have required motions going to the merits of the claims, e.g., motion for summary judgment. Such motions would have permitted a review of the entire voluminous record in this cause. Rather the decision of both the magistrate and the lower court proceeds from a perceived substantive insufficiency of some responses to an inference of willfulness. Substantive insufficiency is not evidence of actual incompleteness. Such a conclusion is based upon the magistrate's opinion regarding credibility as to completeness and in this case is clearly error.

To allow the quantum leap made by the magistrate would initiate a new realm of discretion on the part of the courts to dispose of cases on their merits without the traditional standards to safeguard against the preclusion of the right to proceed to trial by jury on the minimal showing of genuine issues of material fact.

PETITIONERS had produced ample evidence to substantiate a bona fide claim against FLORIDA. The dismissal disposed of significant claims on the merits under the guise of a procedural rule. A perception of incompleteness cannot be allowed to substitute for real evidence demonstrating defiance of a court order.

CONCLUSION

For the foregoing reasons, PETITIONERS respectfully request that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR A WRIT OF CERTIORARI has been furnished, by mail, this ~~third~~ 2nd day of February, 1983, to RALPH DELL, ESQUIRE, Allen, Dell, Frank & Trinkle, Post Office Box 2111, 611 Marine Bank Building, Tampa, Florida 33601.

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